

No. 3319.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE NORMA MINING COMPANY,
a Corporation,

Appellant,

vs.

HUGH MACKAY,

Appellee.

BRIEF ON BEHALF OF APPELLANT

LLOYD MACOMBER,
Attorney for Appellant.

Filed this *day of April, 1910.*

F. D. MONCKTON, Clerk.

By Deputy Clerk.

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STATEMENT OF THE CASE.

This is an appeal from an order confirming a foreclosure sale entered in the above entitled cause by the United States District Court for the District of Arizona on the 9th day of October, 1918.

We respectfully urge that said order confirming sale should be vacated, and the property resold, by reason of irregularities in the sale.

We respectfully urge that the Notice of Sale (see Trans., pages 37, 38 and 39), as given by the Master, was insufficient, by reason of its being uncertain and indefinite, and also because of the fact that it did not accurately or properly describe the property to be sold, and also because it included property which was

owned by defendant and was not covered by the mortgages which are hereinafter referred to, but was excepted from any lien by said mortgages.

The chief reason which we urge, however, for a resale of said property, is that the amount for which said property was sold at said sale is grossly inadequate, and does not exceed ten per cent of the actual value of the property. The property was bought by the mortgagee himself, Mr. Hugh Mackay, who is the appellee in this proceeding, and he can suffer no possible prejudice by a resale of said property.

ASSIGNMENT OF ERRORS.

Now comes the defendant in the above-entitled cause, and files the following assignment of errors upon which it will rely upon its prosecution of the appeal of the above-entitled cause from the order confirming sale, made by the United States District Court, for the District of Arizona, on the 19th day of October, 1918.

I.

That the United States District Court, for the District of Arizona, erred upon the hearing of the motion to confirm said sale in overruling defendant's motion to set aside said sale, as follows: Under the exceptions to said sale, filed by the defendant, said defendant represented to the Court that the notice of said sale published in the "Mohave County Miner," a weekly newspaper published in the town of Kingman, County of Mohave, State of Arizona, did not give sufficient

notice of the time and place of said sale. In support of said contention, the defendant showed by the affidavit of publication of said notice that the said notice failed to fix any hour during the 12th day of June, 1918, the day said property was advertised to be sold, at which said sale would be made.

2.

That the said District Court, upon the hearing of said motion, erred in overruling defendant's motion to set aside said sale as follows: That in support of said motion to set aside said sale, the defendant showed to said Court that the notice of sale published by the plaintiff, as aforesaid, did not describe the property to be sold with sufficient certainty or definiteness to enable the public to ascertain therefrom the character and value of said property, and that the machinery and equipment thereon was not described in any manner whatever in said notice.

3.

That the said District Court, upon the hearing of said motion, erred in overruling defendant's motion to set aside said sale, as follows: That in support of said motion to set aside said sale, the defendant showed to the said Court that the price bid for said property, to wit, the sum of \$27,574.28, was grossly inadequate and that said price did not exceed twenty-five per cent of the actual value of said property, and that the actual value of said property was greatly in excess of One Hundred Thousand Dollars.

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4.

That the said District Court, upon the hearing of said motion, erred in overruling defendant's motion to set aside said sale, as follows: That the defendant, in support of said motion, showed to said Court that at the time said sale was made the public was being importuned and urged by the Federal Government to invest all surplus moneys in Government bonds and other war necessities and the Federal Government at said time discouraged the organization and promotion of new enterprises not necessary to the conduct of the war. That as a result of said policy on the part of the Government, and the condition of the money market arising therefrom, it was at said time very difficult to interest anyone in the purchase of said property.

5.

That the United States District Court, for the District of Arizona, erred in overruling defendant's motion to set aside the sale herein.

6.

That the United States District Court, for the District of Arizona, erred in entering its order confirming the sale herein.

7.

That the United States District Court, for the District of Arizona, erred in entering its order confirming a sale herein, because it affirmatively appears from

the record herein that said sale was prematurely made under the order of sale and the rules of this Court.

WHEREFORE, appellant prays that said order confirming sale be reversed and that said District Court for the District of Arizona be ordered to grant a resale of said property as prescribed by law.

Dec. 28, 1918.

GRANT H. SMITH,
Attorney for Defendant.

[Endorsed]: Filed Mar. 25, 1919, at — M. Mose Drachman, Clerk. By Nat. T. McKee, Deputy.

Stated in concrete the facts of this case are that the plaintiff, Hugh Mackay, held certain mortgages on the property of the defendant, the Norma Mining Company (see Trans., pages 68 to 78, inc.). These mortgages were foreclosed, and a decree entered by the District Court of the United States for the District of Arizona (see Trans., pages 8 to 26), ordering the sale of the property mortgaged. Thereafter the property was sold, and by reason of some irregularity the sale by the District Court was set aside and a resale ordered. (See Trans., pages 33 and 34.) The order of resale was made on the 27th day of April, 1918. On the 12th day of June, 1918 (see Trans., page 35), the sale of which we are here complaining was made.

The reason for our desiring a resale of said property is that, should this sale be allowed to stand, it would work to the great disadvantage and hardship of the

mortgagor, inasmuch as the figure at which the property was sold, to-wit, Twenty-seven Thousand Five Hundred and Seventy-four and $28/100$ Dollars (\$27,574.28), is but slightly more than twenty-five (25) per cent of the actual value of the property.

We respectfully refer the Court to the affidavit of Mr. A. Lafave, on page 51 of the Transcript, wherein Mr. Lafave states that the property is worth more than \$100,000.00.

THE NOTICE OF SALE STATED NO DEFINITE TIME.

The first point we will urge as irregularity in the sale is that the Notice of Sale merely gave the date upon which the sale would be had without stating the hour of the day. The decree (see Trans., page 23) reads:

“After giving public notice of the *time* and place of said sale.”

We respectfully urge that the word “*time*” as it appears in said decree, refers to the hour of the day. The notice (see Trans., page 38) reads:

“*Between the legal hours of sale on Wednesday, the 12th day of June, 1918.*”

Let us assume that the legal hours, as provided by statute, during which the sale may be made, are from nine in the morning until five in the afternoon. Does it not seem to the Court that the notice could very easily, and as a matter of fact should, designate the precise hour at which the sale would be made? The notice as it is is so indefinite that a person desirous of

becoming a bidder at the sale would be deterred from doing so because of the fact that he would have to be at the designated place at nine o'clock in the morning and remain there until perhaps five in the evening at the caprice of the Commissioner of Sale. In the case of an extremely valuable property, some men might be willing to do that, but in cases where the property was of but slight value, it would tend greatly to lessen public interest, and therefore operate to keep away possible bidders, which would in the end result in property being sold at a sacrifice.

We respectfully urge that such a notice as was given in this case is bad for want of certainty, and the better rule would be to require that the time be given with greater definiteness.

THE PROPERTY WAS NOT PROPERLY DESCRIBED.

The next point we will argue is that the property sold was not described with sufficient certainty, and therefore, that it was improperly described.

In the first place, we have here a great deal of personal property in the way of engines and hoisting apparatus, etc., and milling equipment; and the Notice of Sale merely mentions these in general (see Trans., page 39) by saying:

“Together with the mill and the machinery therein and the different hoisting plants on the property.”

We respectfully urge that this description is entirely inadequate and that in justice to the mortgagor the notice should have specified in detail just what the

equipment consisted of. Only by a detailed statement of the amount and character of mechanical equipment could the public be properly advised in reference to the property to be sold. For instance, in the case of valuable mining and milling equipment, if the notice specified the implements with some degree of minuteness the public would be informed just what was to be sold and thereby the number of good bidders brought to the sale by the notice would be greatly increased.

We respectfully submit that the Notice of Sale, as it appears on pages 37, 38 and 39 of the record, contains no sufficient description of the property sold.

In connection with the description of the property we also respectfully urge that the description as it actually was given in the notice was incorrect.

We respectfully call the Court's attention to the two mortgages, Exhibits "B" and "E," on pages 68 and 72, respectively, of the record. It will be noted that these mortgages provide that until the property is actually conveyed under foreclosure proceedings the mortgagor is to have the right to work such mines and remove ore therefrom in the usual manner. From an inspection of these mortgages, as they appear in the record, it is quite clear that this right to work and remove ore will be continuous right up to the time that the commissioner's sale was completed by actual delivery of deed. In other words, that the ore could be removed by the mortgagor in the customary way all during the legal period of redemption.

On page 74 of the Record we read:

Until default shall be made in payments of prin-

cipal, interest, or some of them, or until defaults shall be made in respect to something herein required to be done, performed or kept by said party of the first part, and until the property herein conveyed shall have been sold and conveyed to said party of second part or his assigns or other purchaser by reason of such default, the said party of the first part shall be suffered and permitted to possess, operate, manage, lease, use and enjoy the said property hereby conveyed, and every part and parcel thereof, with the full right and privilege of developing, mining, breaking down, extracting, milling, removing, selling and disposing of any and all ores and products of said property, and of taking and using any and all proceeds, rents, royalties, products, incomes or profits from the said property as fully and to the same extent as if this indenture had not been made.

By the law of Arizona property sold upon foreclosure of mortgage can be redeemed at any time within six months after the date of sale. Therefore, the mortgagor had the right to remove ore from said properties for a period of six months after the foreclosure sale.

As the notice was (see Trans., page 39) it reads:

“Together with all the dips, spurs, and angles and all the metals, ores, gold and silver bearing quartz, rock and earth therein.”

On page 38 of the Record the notice reads, “all the right, title and interest which the defendant, the Norma Mining Company, have in and to the following described property.”

From this it is clear that the Master sold property which was not covered by the mortgage.

We respectfully urge that said notice should have been qualified by restricting the amount of ore to such ores as might be left after the period of redemption had expired.

THE DATE OF SALE WAS PREMATURE.

As we understand the law, in this case, this sale having been made within less than 60 days from the date of the order of sale, was premature. The order of sale was made on the 27th day of April, 1918, and the sale was made on the 12th day of June, 1918, following—just 45 days, including Sundays, intervening between the date of the order of sale and the date of sale.

In conclusion we will state that the Court can take judicial notice of the fact that at the time the sale complained of was made market conditions for such property were extremely bad; that the public at that time was being importuned by the Federal Government to invest all surplus moneys in Government Bonds, and that the Federal Government at that time discouraged the promotion of mining enterprises such as the one here involved, as not necessary to the conduct of the war, and that as a result it was naturally very difficult at that time to interest anyone in the purchase of said property. We firmly believe that if the resale is allowed by the Court a much better price can be realized for the said property, and the mortgagor will thereby be spared from the heavy loss which would otherwise be thrown upon him.

As we have before stated, the mortgagee himself was the purchaser at said sale and for that reason he cannot suffer any prejudice should a resale be granted by this Court.

The ends of justice cannot be defeated by a resale of the property herein involved, but it may indeed greatly lessen the loss of the mortgagor.

Respectfully submitted,

LLOYD MACOMBER,
Attorney for Appellant.

